DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CACR05-1320

SEPTEMBER 20, 2006

SHELTON THORNTON
APPELLANT

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CR 2004-3621]

V.

HON. MARION HUMPHREY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant Shelton Thornton was convicted of rape and sexual assault in the second degree by a Pulaski County jury. He was sentenced to fifteen years' incarceration in the Arkansas Department of Correction. On appeal, appellant argues that the trial court erred by denying his motion for a directed verdict on the charges because the State failed to prove the element of penetration. We affirm.

The evidence at appellant's trial established the following. K.W., who was born on February 1, 1994,[1] occasionally went to the home of her friend Kari to play and spend the night. Kari lived with her grandparents, and appellant is Kari's grandfather. On several occasions while K.W. was visiting the home, appellant told K.W. to touch his "private" and

[1]K. W.'s mother specifically testified as to K. W.'s date of birth.

asked her to touch it with both her hand and her mouth. K.W. testified that she did what he told her to do. She also testified that appellant touched her on "both [of her] privates." She explained that she refers to her private where she "pee-pees" as her "booty" (her term for her vagina) and her private where she "poops" as her "butt." She testified that appellant touched her butt only with his hand, but that he touched her booty (vagina) with both his hands and his tongue. She described how he removed her underwear from beneath her nightgown, made her lay down, and licked her booty (vagina) "pretty hard," and that it hurt when he did so. She further stated that appellant touched her butt at times when they were in his truck.

At the conclusion of the State's case, appellant moved for a directed verdict on the charges, stating that the State had failed to prove the element of penetration. The circuit court denied the motion. Appellant renewed his motion for directed verdict at the conclusion of the State's case in rebuttal, and that motion was also denied. The jury found appellant guilty of both charges and sentenced him to fifteen years in a judgment and commitment order filed on May 11, 2005. He filed a timely notice of appeal on June 1, 2005.

A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *Hamm v. State*, __ Ark. __, __ S.W.3d __ (Mar. 16, 2006). This court has long held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id*. We affirm a conviction if substantial evidence exists to support it. *Id*. Substantial evidence is that which is of sufficient force and character that it will, with

reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Determinations of credibility are left to the jury. *Hucheson v. State*, 92 Ark. App. 307, __ S.W.3d __ (2005).

Arkansas Rule of Criminal Procedure 33.1 states that, in a jury trial, if a motion for a directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution, and at the close of all the evidence. Here, appellant made the required motion and renewal with respect to the rape charge at the proper times; and although both were denied by the circuit court, this issue was properly preserved.

Arkansas Code Annotated section 5-14-103(a)(3)(A) (Supp. 2003) provided that a person commits rape "if he or she engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age." Arkansas Code Annotated section 5-14-101(1) (Supp. 2003) defined "deviate sexual activity" as "any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a person by the penis of another person, or the penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person."

In this case, the victim's testimony is sufficient if it can be said that her use of child-like terms to describe the act of intercourse (or here, oral sex) constitutes substantial evidence. *See Stewart v. State*, 297 Ark. 429, 762 S.W.2d 794 (1989). Our supreme court has held that, even though a child may not use correct terms for a body part but instead uses his own terms or demonstrates a knowledge of what and where those body parts referred to

are, that will be sufficient to allow the jury to believe that a rape occurred. *Id*.; *see also Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986) (allowing child victim to be asked if the defendant touched her with his private parts); *Harris v. State*, 9 Ark. App. 253, 657 S.W.2d 566 (1983) (allowing child victim to testify that the defendant put his "twinkle" in her private place).

Appellant argues that the State did not present substantial evidence of penetration because there was a "failure to specifically establish the object of the victim's assertion that the appellant had touched her 'in her private'." In defining or explaining the term "private," K.W. stated that "private" could mean "booty," which is where she went "pee-pee," or "butt," which is where she went "poop." Appellant argues that at that point in the testimony, the State could have elicited specific testimony that would have established beyond a reasonable doubt that appellant penetrated K.W.'s labia majora or anus. He contends that they failed to do so, because of her stating that appellant touched her "in her private." When related to her own definition of "butt," that could mean that he touched her around the area of either of her privates, but does not necessarily show penetration. While that might have been what she meant, appellant claims that because of the severity of the charges, the State should have been more specific in order to remove all doubt about the meaning of K.W.'s testimony.

K.W.'s specific testimony of what appellant did to her and made her do to him is sufficient evidence to support the conviction on both charges. The uncorroborated testimony

of a rape victim is sufficient to support a rape conviction if the testimony satisfies the statutory requirements. *Marshall v. State*, __ Ark. App. __, __ S.W.3d __ (Jan. 18, 2006). Even if a defendant presents contradictory evidence, the jury is free to believe the victim's testimony and disbelieve the defendant. *Id.*

Specifically, K.W. testified that she obeyed appellant's request that she put her mouth to his penis and that he licked her "booty," which she testified was her word for her vagina. The testimony established that appellant raped K.W. by performing oral sex on her as well as requiring her to perform oral sex on him. Her testimony that he licked her vagina "so hard that it hurt" is sufficient to indicate penetration of the labia majora, and it was not mere speculation for the jury to infer that at least some amount of penetration of her mouth occurred when appellant made her put her mouth to his penis. This court recently reiterated that, in a rape case, "penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced for it would leave little room for doubt, that is sufficient." *Marshall*, *supra* at __, __ S.W.3d at __ (citing *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002); *Tinsley v. State*, 338 Ark. 342, 993 S.W.2d 898 (1999)). The question of whether the evidence excludes every other reasonable hypothesis consistent with innocence is for the jury to determine. *Marshall*, *supra*.

Additionally, evidence was presented that appellant fondled K.W.'s genitals and buttocks on a number of occasions, and she testified that she touched appellant's penis at his

request. Arkansas Code Annotated section 5-14-125(a)(3)(A) (Supp. 2003) provided that a person commits sexual assault in the second degree if, being eighteen years of age or older, he engages in sexual contact with another person not his spouse who is less than fourteen years of age. Arkansas Code Annotated section 5-14-101(9) (Supp. 2003) defined "sexual contact" as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." We find that K.W.'s testimony was sufficient to support the rape conviction as well as the conviction for sexual assault in the second degree, and accordingly, we affirm.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree